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Supreme Court, U.S.
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No. 96-8986

In the Supreme Court of the United States

October Term, 1996

Arnold F. Hohn,
Petitioner,

v.

United States of America,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF THE PETITIONER

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INTEREST OF AMICUS*

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with a membership of more than 9,000 attorneys and 28,000 affiliate members in 50 states. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates.

NACDL was founded over 35 years ago to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in the correctness and fairness of criminal convictions. Among NACDL's objectives are to promote the proper administration of justice and to ensure that statutes are construed and applied in accordance with due process.

Letters from the parties to this case expressing their consent to the filing of this brief are on file with the clerk.

*Counsel for neither party authored this *amicus curiae* brief, in whole or in part. No person or entity, other than the *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief.

QUESTIONS PRESENTED

1. Whether a federal prisoner who demonstrates that he is incarcerated for conduct that this Court conclusively determined does not constitute a federal crime has made "a substantial showing of the denial of a constitutional right" warranting issuance of a certificate of appealability under 28 U.S.C. §2255.

2. Whether a defendant's failure to raise an argument on direct appeal, when that argument was foreclosed by binding circuit precedent and had been uniformly rejected by other circuits, constitutes a knowing and intelligent "waiver," precluding any showing of "cause and prejudice" or other excuse for the procedural default in a collateral review proceeding.

3. Whether a defendant who possesses a firearm and drugs in close proximity to each other, but neither bears the firearm on his person, nor otherwise transports it, commits the crime under 18 U.S.C. §924(c) of "carr[ying]" a firearm "during and in relation to" the predicate offense of possession of the drugs with intent to distribute them.

STATEMENT OF THE CASE

The petition for certiorari accurately describes the circuit judgment this Court is asked to review.

ARGUMENT

This case is certworthy not only for the reasons the petitioner ably asserts, but for two other reasons as well. First,

the circuit court's construction of the adjective "constitutional" in §2253(c)(2), if accepted, would undermine the correct interpretation of other provisions in the AEDPA and, in the end, would frustrate an accurate, sensible, coherent interpretation of the Act as a whole. Second, the circuit court's construction raises serious constitutional questions.

Unfortunately, the circuit court below acted too quickly in a *pro se* case, looked only at a single term in a single provision of the new Act, jumped to an unwarranted conclusion regarding its meaning in the abstract, and made a serious mistake. That error should be corrected before it does further damage.

Since Congress enacted the AEDPA just over a year ago, the lower courts have wrestled with the meaning of the adjective "constitutional"—as that modifier is used by the Act in a variety of contexts. The pressure has mounted in recent weeks, as prisoners have rushed to meet the Act's new filing deadlines. Widespread difficulty and injustice will result if the system goes much longer without this Court's authoritative guidance on what is, in fact, a threshold question in many §2255 and habeas corpus cases. Not only petitioners' entitlement to appellate review, but many other crucial matters are at stake: the computation of filing deadlines and petitioners' right to evidentiary hearings and stays of execution.

I. THE CIRCUIT COURT'S CONSTRUCTION OF §2253(c)(2) CANNOT BE RECONCILED WITH OTHER PROVISIONS OF THE AEDPA AND THE ACT AS A WHOLE

Other key provisions of the Act also employ the adjective "constitutional." If that term is understood in those

instances to mean what the circuit court misconstrues it to mean in §2253(c)(2), the various working parts of the full Act cannot function, individually or together in an integrated system.

According to unamended language in §2255, a federal prisoner is entitled to seek relief on the ground that he or she is in custody under a sentence that was imposed in violation of the Constitution "or laws" of the United States, a sentence "in excess of the maximum allowed by law," or a sentence "otherwise subject to collateral attack." And according to similarly unamended text in §2241(c)(3) and §2254(a), a state prisoner is also entitled to seek habeas corpus relief on the ground that he or she is in custody in violation of the "laws" of the United States. Clearly, then, the new Act makes no attempt to banish federal nonconstitutional claims from the purview of federal collateral remedies.[1]

By the circuit court's account, however, the Act draws a clear constitutional/nonconstitutional distinction to control the way in which cases are processed after they enter the federal courthouse door. That position is untenable. The Act uses the "constitutional" designation in some contexts in which it cannot possibly mean to exclude nonconstitutional matters. Thus the Act plainly uses the modifier "constitutional" interchangeably with "federal" or, perhaps, as a synonym for "fundamental" or "cognizable."

Under a new provision in the Act, §2244(d)(1)(C), the

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[1] See *Hill v. United States*, 368 U.S. 424, 428 (1962) (explaining that fundamental nonconstitutional defects will suffice in 2255 cases); *Reed v. Farley*, 512 U.S. 339 (1994) (confirming that state prisoners can obtain habeas relief on a showing of serious violations of federal nonconstitutional law).

filing period for some habeas corpus petitions by state prisoners runs from the date on which the "constitutional right asserted was initially recognized." If the circuit court is correct in its construction of the adjective "constitutional" in §2253(c)(2), it follows that the same interpretation must be given to the "constitutional" modifier in §2244(d)(1)(C). Yet if the adjective "constitutional" in that provision is read to exclude nonconstitutional claims by negative implication, it must follow that the filing period is computed on the basis of an event that never occurs in some cases (i.e., cases in which the applicant attacks his or her conviction on federal nonconstitutional grounds). That, however, is a meaning that §2244(d)(1)(C) cannot sensibly bear.

Like §2244(d)(1)(C), §2255 (as amended by the Act) establishes a filing period for federal prisoners, which runs in some cases from the date on which a "right" is "newly recognized." In that instance, §2255 does not use the modifier "constitutional." If the appearance of the "constitutional" modifier in §2244(d)(1)(C) excludes nonconstitutional claims by implication, it follows that the omission of the same term from §2255 *includes* nonconstitutional claims. The result is that the filing period in §2255 cases must be geared to the establishment of nonconstitutional principles, while the parallel deadline for habeas petitions demands a purely constitutional footing. Those two provisions cannot sensibly be read to establish such an obvious inconsistency.

Another new provision, §2254(e), governs the federal courts' authority to conduct evidentiary hearings with respect to habeas petitions by state prisoners. Under subparagraphs (A)(i) and (B) of §2254(e)(2), prisoners who failed to develop the facts in state court can obtain a federal hearing to pursue "constitutional" matters—either claims that rely on new rules of "constitutional" law, or evidence that would have convinced

the jury to acquit,but for "constitutional" error.

If the circuit court's interpretation of the "constitutional" adjective in §2253(c)(2) is correct, it must follow that the same construction must be placed on that identical term in §2254(e)(2). That means, however, that state habeas corpus petitioners who advance perfectly cognizable nonconstitutional claims for relief (but failed to develop the relevant facts in state court) are out of luck in federal court—no matter how "new" a claim may be, no matter how difficult it would have been to discover its factual predicate when the case was before the state courts, and, indeed, no matter how closely the claim is linked to innocence. This, on the inconsistent theory that only purely "constitutional" claims need apply for fact-finding in federal court. That cannot be what §2254(e) means.

Any such reading of §2254(e) conflicts with settled law governing hearings in §2255 cases. The new Act's amendments to §2255 do not address hearings and thus leave previous law in this respect intact. Of course, federal district courts can conduct fact-finding hearings regarding nonconstitutional claims raised by federal prisoners.

Forbidding evidentiary hearings in habeas cases presenting nonconstitutional claims would also conflict with related provisions in Chapter 154 of the Act, which governs death penalty cases in qualifying states. Under §2264(b) of that new chapter, federal courts are expressly instructed to adjudicate prisoners' claims "subject to" §2254(e). Plainly, then, §2254(e) can bear only a construction that can be reconciled, in turn, with the provisions in Chapter 154.

Under §2262(b)(3), prisoners can sustain a stay of execution if they make a substantial showing of the denial of "a

Federal right." Here again, if the appearance of the adjective "constitutional" in §2253(c)(2) precludes nonconstitutional claims, it must follow that the omission of that modifer from §2262(b) *includes* nonconstitutional claims. That means, however, that §2262(b) permits a prisoner to preserve a stay of execution on the strength of a nonconstitutional claim, even as a sister provision of the same Act, §2254(e), systematically refuses claims of that nature a federal evidentiary hearing.

Under §2264(a)(2), prisoners who are subject to Chapter 154 can advance a claim based on a "new Federal right" (not necessarily "constitutional" in nature)—despite procedural default with respect to that claim in state court. And, under §2264(a)(3), prisoners can press newly discovered facts related to any "claim" (again, not necessarily "constitutional" in character). By the circuit court's account of the adjective "constitutional," however, nonconstitutional claims are systematically denied federal evidentiary hearings. If that view is accepted, it must follow that §2264 excuses a prisoner's default with respect to a nonconstitutional claim and, indeed, instructs a federal habeas court to adjudicate that claim on the merits, but (at the same time and by virtue of the same Act), §2254(e) bars the court from taking evidence regarding the claim. That cannot be what §2264(a) means.

Finally, under §2244(b)(2)(A), state prisoners can file a second or successive petition in some instances, provided they rely on a "new rule" of "constitutional" law. Similarly, under §2255, federal prisoners, too, can press "new rule" claims described as "constitutional." By the circuit court's account of the adjective "constitutional," those provisions must contemplate that prisoners face a blanket prohibition on nonconstitutional, but otherwise perfectly cognizable, claims—no matter how "new" they may be. That cannot be

what §2244(b)(2)(A) and §2255 mean.[2]

Consider in this connection that, with respect to innocence-related claims, the successive petition provision in §2255 omits any reference to the "constitutional" adjective. So prisoners who press a nonconstitutional claim are entitled to proceed—provided they link that kind of claim to innocence in the manner prescribed.[3] It is inconceivable, then, that in the same breath §2255 flatly bars successive petitions advancing "new rule" claims that are nonconstitutional in nature.

Since prisoners are now filing successive habeas petitions and §2255 motions that are controlled by the new Act, this is where the erroneous case law is developing most

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[2] Together, §2262(b)(3) and (c) have it that if a prisoner's claim is rejected, no other federal court can thereafter issue a stay—unless the prisoner meets the additional standards for filing a second or successive petition established by §2244(b). If, however, §2244(b) unilaterally excludes nonconstitutional claims, §2262 must mean that a stay can remain in place on the basis of a nonconstitutional claim, even though another court would be barred from issuing a new stay unless something purely "constitutional" is offered. That cannot be what §2262 means.

[3] This is scarcely surprising; a nonconstitutional claim touching innocence is an excellent candidate for a second or successive §2255 motion. Yet by allowing such a claim to be advanced in a successive motion, §2255 rejects any clean constitutional/nonconstitutional basis of distinction.

Of course, the AEDPA does establish restrictions on multiple collateral applications. The point is that those restrictions go not to the substantive claims that can be advanced, but rather to the abusive manner in which some prisoners attempt to proceed. They bar not federal claims of a particular (nonconstitutional) nature, but federal claims of any nature—if those claims are pressed in needlessly repetitive collateral actions.

rapidly—much of it explicitly in reliance on the Eighth Circuit's misconstruction of the modifier "constitutional" in this case.[4]

To sum up, the circuit's interpretation of the adjective "constitutional" ascribes to the AEDPA a purpose to create a series of arbitrary, Byzantine snarls in the federal courts' handling of claims that plainly are cognizable in collateral proceedings. By the circuit's account, a petitioner who advances a purely "constitutional" claim is free to file a collateral petition, so long as he meets one of the filing deadlines established by the Act, and is equally entitled to federal fact-finding, a stay of execution, and (if necessary) appellate review—provided he meets the standards prescribed for those ordinary tools of effective adjudication.

By contrast, according to the circuit, a petitioner who advances a nonconstitutional claim faces an entirely different landscape. He is free to file a petition, but he must meet a filing deadline that takes no account of how recently his claim materialized. This is so not because anyone thinks the petitioner should have anticipated a "new" nonconstitutional claim, but only because his claim is, by nature, nonconstitutional. If the facts supporting his claim were not developed in state court, the petitioner cannot obtain a federal hearing even if he meets the standards the Act establishes for determining whether procedural default in state court should be excused. This is so not because anyone thinks that the petitioner could have developed the facts previously, but only

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[4] E.g., *Coleman v. United States*, 106 F.3d 339 (10th Cir. 1997); *United States v. Lorentsen*, 106 F.3d 278 (9th Cir. 1997); *In re Blackshire*, 98 F.3d 1293 (11th Cir. 1996); *Nunez v. United States*, 96 F.3d 990 (7th Cir. 1996).

because his claim is nonconstitutional in character. If the petitioner needs a stay of execution, he may get one. But the district court may be unable to hold a hearing to determine his claim responsibly—again, only because the claim falls in the nonconstitutional category. Finally, of course, if the district court rules unfavorably, the petitioner is barred from seeking appellate review—again, not because anyone has concluded that his claim is frivolous and does not warrant appellate consideration, but because it is nonconstitutional in nature.

Such an internally inconsistent maze of arbitrary traps is nothing to ascribe to the United States Congress or a new statute meant to bring good sense, order, and efficiency to the system. The AEDPA may not be perfect. But it is not Catch 22.

The only sensible construction that can be placed on the Act is that it employs the adjective "constitutional" to denote matters that are cognizable in federal collateral proceedings—not formalistically to foreclose matters that are cognizable, but are nonetheless nonconstitutional in character. The reason is plain enough. The primary purpose of the Act is to make federal habeas litigation more efficient, virtually all the claims raised by state prisoners *are* constitutional in nature, and the Act simply employs that designation because it is usually accurate.

II. THE CIRCUIT'S CONSTRUCTION OF §2253(c)(2) RAISES SERIOUS CONSTITUTIONAL QUESTIONS

Just as it makes sense to construe the AEDPA in a way that avoids irrational, freakish results, it equally makes sense to read the new Act in a way that avoids serious constitutional questions under Article III. Yet the circuit court's

interpretation bristles with constitutional difficulty. By the circuit court's account of §2253(c)(2), all prisoners, state and federal, can press nonconstitutional claims at the district level, but not higher. District court judgments on nonconstitutional federal claims are, then, effectively final in some instances.

Making a single district judge the sole arbiter of nonconstitutional federal claims would not only be novel. It would invite serious constitutional objections. Appellate review at the circuit level and, indeed, in this Court, serves both to correct errors below and to ensure a uniform interpretation of federal law. If, in habeas and §2255 cases involving nonconstitutional claims, district court judgments are invulnerable to review, both those values are sacrificed. In the case of §2255 motions, the claims at stake were not typically available at trial or on appeal, but are entirely fresh—cognizable for the first time in collateral proceedings. Making district court judgments final with respect to claims of that kind places the responsibility of giving federal law its authoritative interpretation in the hands of a single individual.[5]

Moreover, the arrangement the circuit court ascribes to §2253(c)(2) is not outcome-neutral. For §2253 does not require the respondent (i.e., the state or the federal government) to obtain a certificate before appealing a judgment *in the prisoner's favor*. If §2253 permits government appeals in cases

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[5] This Court might still reach down for a case by some extraordinary means—perhaps its jurisdiction to entertain habeas petitions as an "original" matter, see *Felker v. Turpin*, 116 S.Ct. 2333 (1996), or its authority under the All-Writs Act to issue the common law writ of certiorari. See *Davis v. Jacobs*, 454 U.S. 911 (1981). Yet the formal availability of that kind of avenue in an extraordinary case scarcely defuses the problems that would attend making district court judgments final in an entire category of cases.

involving nonconstitutional claims, but precludes prisoner-initiated appeals, this newly amended statute skews the results that Article III courts can reach on federal issues. Errors that favor prisoners are subject to review and may be corrected, but errors that favor the government are insulated from review and may stand. That kind of legislative manipulation of judicial outcomes has been invalid for over a century.[6]

Nothing of this sort occurred prior to the circuit court's extraordinary construction of the AEDPA's amendment to §2253. Before the amendment, disappointed habeas petitioners proceeding under §2254, but not governmental respondents, were required to obtain a certificate as a condition for appellate review. Yet at that time §2253 did not employ the "constitutional" adjective and thus established only a merits-related screening test to ensure that prisoners did not advance frivolous claims (of any cognizable nature) on appeal. That regime was one-sided, to be sure, but it insulated the appellate courts from meritless claims—not an entire category of cognizable claims, irrespective of their merit. Gatekeeping devices that detect worthless claims are familiar and perfectly valid. The arrangement the circuit court's judgment here reflects is not of that order.

It is one thing to require prisoners to show some baseline substance to their appellate claims before allowing them to proceed, but to assume that state officials will police themselves. It is quite another to refuse to allow prisoners to advance plainly meritorious claims merely because those

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[6] *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871). See *United States v. Sioux Nation of Indians*, 448 U.S. 371, 404 (1980)(explaining that *Klein* faulted a statute that forced this Court to decide a case in the government's favor).

claims are nonconstitutional in nature, but to open the federal appellate courts' doors in the same kind of case—if the warden, rather than a prisoner in gaol, comes knocking. Yet that is precisely the perverse arrangement the circuit court envisions.

The circuit court below held that certificates cannot be issued with respect to nonconstitutional claims. Other courts have indicated agreement, yet without significant discussion and certainly without explicit attention to the constitutional issues.[7] Still other courts have hesitated to follow suit—sensing, perhaps, the serious Article III problems that such a construction of the Act entails.[8]

The situation thus invites this Court's attention, lest inconsistent judgments build up in short order, many of them erroneous, raising even more (equally difficult) problems to resolve. A new statute like the AEDPA may require time for the bugs to be sorted out. In this instance, however, the lower courts will flounder over fundamental constitutional issues at the very threshold of many cases—unless and until they receive this Court's guidance.

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[7] E.g., *Lozada v. United States*, 107 F.3d 1011 (2d Cir. 1997)(accepting the Eighth Circuit's premise that nonconstitutional claims are excluded—but without elaboration in a case in which the parties did not dispute the question). Cf. *United States v. Orozco*, 103 F.3d 389 (5th Cir. 1996)(intimating agreement).

[8] E.g., *Santana v. United States*, 98 F.3d 752, 757 (3d Cir. 1996)(expressly foregoing a decision on whether the reference to "constitutional" claims excludes nonconstitutional claims); *Herman v. Johnson*, 98 F.3d 171 (5th Cir. 1996)(avoiding the issue by finding a prisoner's showing insufficient irrespective of whether his claim was nonconstitutional in nature). Cf. *United States v. Campos*, 932 F. Supp. 1034, 1038 (W.D. Tenn. 1996)(clearly recognizing that the term "constitutional" appears in the new provision but nonetheless treating the language of the new and the old law to be "exactly" the same).

CONCLUSION

For the reasons given above, the Court should grant the petitioner's petition for review and should reverse the circuit court's judgment.

Respectfully submitted,

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